

November 20, 2002

Mr. Randy Pahl  
Standards Branch Supervisor  
Nevada Division of Environmental Protection  
333 W. Nye Lane, Room 138  
Carson City, NV 89706

Dear Mr. Pahl:

Thank you for submitting Nevada's 2002 Section 303(d) list of water quality limited water bodies. EPA has conducted a complete review of this submittal dated September 30, 2002, a follow-up letter dated November 6, 2002, and supporting documentation and information. Based on this review, EPA has determined that Nevada's 2002 list of water quality limited segments (WQLSs) still requiring TMDLs partially meets the requirements of Section 303(d) of the Clean Water Act ("CWA" or "the Act") and EPA's implementing regulations. Nevada's water body listing and priority ranking decisions meet the listing requirements; however, Nevada's decisions not to list several waters and pollutants identified in the enclosed tables do not meet the listing requirements. Therefore, by this order, EPA hereby partially approves and partially disapproves Nevada's 2002 Section 303(d) list. Specifically, EPA approves the State's decisions to list all the water bodies and associated pollutants identified in Table A-1 of the State's listing submission and associated priority rankings. EPA disapproves the State's decisions not to list 15 waters and associated pollutants, and additional pollutants for 38 waters already listed by the State. These additional waters and pollutants are identified in the enclosed tables. EPA is further identifying these additional water bodies and pollutants with appropriate priority rankings for inclusion on the 2002 Section 303(d) list. EPA will open a public comment period on the additions to the list and will, if necessary, revise the list of added waters and pollutants after we consider any comments received. The statutory and regulatory requirements, and a summary of EPA's review of Nevada's compliance with each requirement, are described in the second enclosure.

EPA's partial approval of Nevada's Section 303(d) list extends to all water bodies on the list with the exception of those waters that are within Indian Country, as defined in 18 U.S.C. 1151. EPA is taking no action to approve or disapprove the State's list with respect to those waters at this time. EPA, or eligible Indian Tribes, as appropriate, will retain responsibilities under Section 303(d) for those waters. EPA's decision to add waters and pollutants to Nevada's 2002 Section 303(d) list does not apply to any waters in Indian Country.

Nevada's 303(d) submission includes 84 water body segments and 220 water body-pollutant combinations. The State listings are based on an assessment methodology described in the State submittal. Priority rankings for all listed waters are established as required by Section 303(d) and its implementing regulations. Priorities are established based on eleven factors listed on p. 14 of the State submittal. Twenty-nine water body/ pollutant combinations are targeted for TMDL development in the next two years, consistent with the targeting requirement of 40 CFR 130.7.

The public participation process sponsored by Nevada Division of Environmental Protection (NDEP) included solicitations of public comments through newspaper advertisements, several public hearings, and preparation of a responsiveness summary explaining how the State considered public comment in the final listing decisions.

Thank you for your efforts to develop the 2002 Section 303(d) water body list and for being so responsive to our clarification requests. We will continue to coordinate with you during the upcoming comment period. If you have questions on any of the above information, feel free to give me a call at (415) 972-3435 or call David Smith at (415) 972-3416.

Sincerely,

|original signed by J. Kemmerer for|

Catherine Kuhlman  
Acting Director  
Water Division

Enclosures

Enclosure:

Table 1: Waters and Pollutants Added to Nevada's 2002 Section 303(d) List Based on Designated Use Exceedences

<b>Water body ID</b>	<b>Water body</b>	<b>Reach Description</b>	<b>Pollutant</b>
NV04-HR-07-C	Humboldt River	Woolsey to Rodgers Dam	pH
NV04-HR-27C	Maggie Creek	Confluence with Jack Creek to Humboldt River	pH
NV04-HR-101	Willow Creek (tributary to Pine Creek and Humboldt R. 445A.205)	Below Buckhorn Mine	Cn
NV04-NF-16A	Sammy Creek (tributary to NF Humboldt River)	waste rock to confluence with NF Humboldt R.	Se
NV04-NF-17-B	North Fork Humboldt River	National Forest Boundary to Humboldt River	pH
NV06-SC-41-C	Steamboat Creek	Washoe Lakes to Sec. 33, T18N, R20E	pH
NV06-SC-52-C	Galena Creek	Sec. 2, T17N, R19E to Steamboat Creek	pH
NV06-SC-53-A	Whites Creek	Source to east line of Sec. 33, T18N, R19E	pH
NV06-SC-55-A	Thomas Creek	Source to National Forest Boundary	pH
NV08-CR-12	Carson River	Weeks to Lahontan Dam	pH
NV08-CR-17-A	Clear Creek	Origin to Gaging Station in Sec. 1, T14N, R19E	pH
NV13-CL-01	Colorado River	Lake Mohave Inlet to CA stateline	pH
NV13-CL-02	Colorado River	Hoover Dam to Lake Mohave Inlet	pH

**Table 2: Waterbodies and Pollutants Added to Nevada's 2002 Section 303(d) List due to Exceedances of RMH Qs (Requirements to Maintain Higher Quality Water)**

<b>Water body ID</b>	<b>Water body Name</b>	<b>Reach Description</b>	<b>Pollutant</b>
NV03-SR-02	Salmon Falls Creek	Above stateline	Fecal coliform
NV03-JR-12	East Fork Jarbidge River	Above stateline	Fecal coliform
NV03-JR-13	Jarbidge River	Source to Town of Jarbidge	Total phosphorus
NV04-HR-01	Humboldt River	Origin to Osino	pH
NV04-HR-02	Humboldt River	Osino to Palisade	Chlorides
			pH
NV04-HR-03	Humboldt River	Palisade to Battle Mtn	pH
NV04-HR-04	Humboldt River	Battle Mtn to Comus	Chlorides
			pH
			Total dissolved solids
NV04-HR-05	Humboldt River	Comus to Imlay	Chlorides
			pH
NV04-HR-06	Humboldt River	Imlay to Woosley	Total dissolved solids
NV06-TB-09-00	1st Creek	Origin to Lake Tahoe	pH
			Total nitrogen
NV06-TB-10-01	2nd Creek	2nd Creek Drive to Lake Tahoe	pH
			Total nitrogen
NV06-TB-10-02	2nd Creek	Origin to 2nd Creek Drive	pH
			Total nitrogen
NV06-TB-12	3rd Creek	Lake Tahoe to EF 3rd Creek at Highway 431 and to WF 3rd Creek Origin	Chlorides
			Total dissolved solids
NV06-TB-14	WF Incline Creek	Origin to Highway 431	Chlorides
			pH
			Total dissolved solids
			Total nitrogen
			Turbidity
NV06-TB-15	EF Incline Creek	Ski resort to Origin	pH
			Total nitrogen

NV06-TB-16	Incline Creek	Lake Tahoe to EF Incline Creek at ski resort and to WF Incline Creek at Highway 431	Chlorides
			pH
			Total nitrogen
NV06-TR-02	Truckee River	Stateline to Idlewild	Total nitrogen
NV06-TR-03	Truckee River	Idlewild to East McCarran	Total nitrogen
NV06-TR-05	Truckee River	Lockwood to Derby Dam	Turbidity
NV08-CR-01	WF Carson River	At Stateline	pH
			Total nitrogen
			Total phosphorus
NV08-CR-02	Bryant Creek	Near Stateline	Total nitrogen
			Total phosphorus
NV08-CR-04	EF Carson River	Stateline to Highway 395	pH
			Total dissolved solids
			Total nitrogen
NV08-CR-05	EF Carson River	Highway 395 to Muller Lane	pH
			Total nitrogen
NV08-CR-06	EF/WF Carson River	Genoa Lane to EF Carson River at Muller Lane and to WF Carson River at Stateline	pH
			Total dissolved solids
NV08-CR-07	Carson River	Genoa Lane to Cradlebaugh Bridge	Chlorides
			pH
			Total dissolved solids
NV08-CR-08	Carson River	Cradlebaugh Bridge to Mexican Ditch Gage	Sulfate
NV08-CR-09	Carson River	Mexican Ditch Gage to New Empire	pH
NV08-CR-10	Carson River	New Empire to Dayton Bridge	Chlorides
			pH
			Turbidity
NV08-CR-11	Carson River	Dayton Bridge to Weeks	Chlorides
			Fecal coliform
			pH
			Turbidity

NV08-CR-12	Carson River	Weeks to Lahontan Dam	Chlorides
			Total dissolved solids
			Turbidity
NV09-WR-01	West Walker River	At Stateline	Total suspended solids
NV09-WR-02	Topaz Lake	Topaz Lake (Nevada portion)	Total nitrogen
			Total suspended solids
			Turbidity
NV09-WR-03	West Walker River	Stateline to Wellington	Chlorides
			Total dissolved solids
			Total nitrogen
			Total phosphorus
NV09-WR-04	West Walker River	Wellington to Confluence with East Walker River	Chlorides
			Total phosphorus
NV09-WR-05	Sweetwater Creek	Stateline to Confluence with East Walker River	Total nitrates
NV09-WR-06	East Walker River	At Stateline	Total nitrogen
NV09-WR-08	East Walker River	East Walker River from Bridge B-1475 to the confluence with the W. Walker	Sulfate
NV13-CL-04	Lake Mead/Las Vegas Bay	Las Vegas Bay	chlorophyll a
NV13-CL-07	Virgin River	Stateline to Mesquite	Total nitrogen

## **Review of Nevada's 2002 Section 303(d) Water body List**

*Enclosure to letter from Catherine Kuhlman, EPA Region 9 to Randy Pahl, NDEP*

Date of Transmittal Letter From State: September 30, 2002

Date of Receipt by EPA: October 1, 2002

Date of Supplemental Transmittal From State: November 6, 2002

### **Purpose**

The purpose of this review document is to describe the rationale for EPA's partial approval and partial disapproval of Nevada's 2002 Section 303(d) list of water quality limited waters requiring TMDLs. The following sections identify those key elements to be included in the list submittal based on the Clean Water Act and EPA regulations (see 40 CFR Section 130.7). EPA reviewed the methodology used by the State in developing the 303(d) list and the State's description of the data and information it considered. EPA's review of Nevada's 303(d) list is based on EPA's analysis of whether the State reasonably considered existing and readily available water quality-related data and information and reasonably identified waters required to be listed.

### **Statutory and Regulatory Background**

#### **Identification of WQLSs for Inclusion on Section 303(d) List**

Section 303(d)(1) of the Act directs States to identify those waters within its jurisdiction for which effluent limitations required by Section 301(b)(1)(A) and (B) are not stringent enough to implement any applicable water quality standard, and to establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters. The Section 303(d) listing requirement applies to waters impaired by point and/or nonpoint sources, pursuant to EPA's long-standing interpretation of Section 303(d).

EPA regulations provide that States do not need to list waters where the following controls are adequate to implement applicable standards: (1) technology-based effluent limitations required by the Act, (2) more stringent effluent limitations required by federal, State or local authority, and (3) other pollution control requirements required by State, local, or federal authority. See 40 CFR 130.7(b)(1).

## Consideration of Existing and Readily Available Water Quality-Related Data and Information

In developing Section 303(d) lists, States are required to assemble and evaluate all existing and readily available water quality-related data and information, including, at a minimum, consideration of existing and readily available data and information about the following categories of waters: (1) waters identified as partially meeting or not meeting designated uses, or as threatened, in the State's most recent Section 305(b) report; (2) waters for which dilution calculations or predictive modeling indicate nonattainment of applicable standards; (3) waters for which water quality problems have been reported by governmental agencies, members of the public, or academic institutions; and (4) waters identified as impaired or threatened in any Section 319 nonpoint assessment submitted to EPA. See 40 CFR 130.7(b)(5). In addition to these minimum categories, States are required to consider any other data and information that is existing and readily available. EPA's 1991 Guidance for Water Quality-Based Decisions describes categories of water quality-related data and information that may be existing and readily available. See Guidance for Water Quality-Based Decisions: The TMDL Process, EPA Office of Water, 1991, Appendix C ("EPA's 1991 Guidance"). While States are required to evaluate all existing and readily available water quality-related data and information, States may decide to rely or not rely on particular data or information in determining whether to list particular waters.

In addition to requiring States to assemble and evaluate all existing and readily available water quality-related data and information, EPA regulations at 40 CFR 130.7(b)(6) require States to include as part of their submissions to EPA documentation to support decisions to rely or not rely on particular data and information and decisions to list or not list waters. Such documentation needs to include, at a minimum, the following information: (1) a description of the methodology used to develop the list; (2) a description of the data and information used to identify waters; and (3) any other reasonable information requested by the Region.

### Priority Ranking

EPA regulations also codify and interpret the requirement in Section 303(d)(1)(A) of the Act that States establish a priority ranking for listed waters. The regulations at 40 CFR 130.7(b)(4) require States to prioritize waters on their Section 303(d) lists for TMDL development, and also to identify those WQLSs targeted for TMDL development in the next two years. In prioritizing and targeting waters, States must, at a minimum, take into account the severity of the pollution and the uses to be made of such waters. See Section 303(d)(1)(A). States may consider other factors relevant to prioritizing waters for TMDL development, including immediate programmatic needs, vulnerability of particular waters as aquatic habitats, recreational, economic, and aesthetic importance of particular waters, degree of public interest and support, and State or national policies and priorities. See 57 FR 33040, 33045 (July 24, 1992), and EPA's 1991 Guidance.



## **Analysis of Nevada's Submission**

### **Identification of Waters and Consideration of Existing and Readily Available Water Quality-Related Data and Information.**

EPA has reviewed the State's submission, and has concluded that the State developed its Section 303(d) list in partial compliance with Section 303(d) of the Act and 40 CFR 130.7. Because Nevada's submission does not include all waters that meet Section 303(d) listing requirements, EPA is partially approving and partially disapproving Nevada's list submission and adding the additional waters and pollutants that meet the listing requirements to the final 2002 list. EPA's review is based on its analysis of whether the State reasonably considered existing and readily available water quality-related data and information and reasonably identified waters required to be listed.

Nevada conducted a relatively thorough assessment of water quality conditions based on a broad search for data and information, and a new assessment methodology that is described in detail in the listing submission. The State's general approach was to thoroughly assess waters for which sufficient data and information were available to do so, and to continue listing waters contained on the 1998 Section 303(d) list absent new data and information to support a careful assessment of their current condition. This approach is consistent with federal listing requirements. EPA supports the State's approach of retaining on the list all previously listed waters until new data and information are available to support a change in their assessment.

The State carefully assembled and considered existing and readily available data and information sources, including each of the sources identified in 40 CFR 130.7(b)(5) except as discussed below (Submittal, pp. 3-4). The State solicited data and information from the public prior to developing its listing recommendations and provided extensive opportunities for the public to comment on its listing recommendations. The State specifically considered the relationship between assessments in the 2002 Section 305(b) report and the Section 303(d) list, and provided a reasonable explanation for any differences in assessment findings in those two reports. (Submittal, pp. 3-4). The State did not revisit the Section 319 Assessment Report as part of the 2002 Section 303(d) list analysis. This approach was reasonable because the State's assessment approach involved incremental changes to the 1998 Section 303(d) list based on more recently available data and information where available. As described in EPA's approval of the 1998 Section 303(d) lists, the results of Nevada's most recent Section 319 assessment were considered in the development of that list. The Section 319 assessment has not been updated since 1998, and the State retained waters listed in 1998 on the 2002 Section 303(d) list absent more recent data and information. Therefore, the State considered the results of the now-dated Section 319 assessment in its 2002 Section 303(d) listing assessment.

The listing methodology employed by Nevada for 2002 describes a set of decision criteria that were flexibly applied (Submittal, pp. 2-16, 19-25). In general, waters were listed in cases where at least 10 samples were available and more than 10% of available samples exceeded the applicable water quality standards during the past 5 years. For waters that did not meet the 10 sample/10% exceedence test, the State also applied a weight of evidence approach in examining individual waters and pollutants. The State considered the type of pollutant involved, the water body and watershed characteristics, the magnitude and distribution of exceedences, and other information about the water body including land use characteristics. These assessments were summarized in the Submittal and, in some cases, the response to comments. Based on its weight of evidence approach, the State listed several waters that did not meet the 10 sample/10% exceedence assessment criterion. For example, the State also listed waters for which a fishing, drinking, or swimming advisory was in effect during the prior 5 years, and several waters that did not meet the 10 sample minimum but still had persuasive evidence of standards exceedences.

EPA has reviewed Nevada's description of the data and information it considered, its methodology for identifying waters, the State's response to EPA's letter dated October 7, 2002, and the State's responsiveness summary. EPA concludes that the State properly assembled all existing and readily available data and information, including data and information relating to the categories of waters specified in 40 CFR 130.7(b)(5). EPA concludes that the State's decisions to list the waters identified in Table A-1 of its listing submittal are consistent with federal listing requirements. However, EPA concludes that the State's decision not to list several waters and pollutants are not consistent with federal listing requirements. As discussed in detail below, the available data and information are sufficient to support a conclusion that these waters are water quality limited and need to be listed pursuant to Section 303(d).

Although EPA reviewed Nevada's listing methodology as part of our review of the listing submission, EPA's partial approval of the State's listing decisions should not be construed as concurrence with or approval of the listing methodology. EPA is not required to take action on the listing methodology itself under 40 CFR 130.7. EPA's decision to partially approve and partially disapprove Nevada's listing decisions is based on EPA's review of the data and information submitted concerning individual waters and the State's evaluations of those waters. While EPA considered the State's listing methodology as part of its review, our evaluation was intended to determine whether the State had identified all waters that meet federal listing requirements specified in Section 303(d) and 40 CFR 130.7. Although EPA was concerned about some aspects of the State's listing methodology, those concerns are irrelevant to our final listing decision unless the State actually did not list specific waters or pollutants that meet federal listing requirements.

For example, in its comments on the Nevada draft list, EPA expressed concern about the State's proposal to apply a 10% exceedence rule for acute water quality standards for toxic pollutants because that approach is apparently inconsistent with State water quality standards and

EPA's 1997 and 2002 assessment guidance documents (see EPA letter dated September 6, 2002). These federal guidance documents indicate that waters should generally be considered water quality limited if they exceed acute water quality standards for toxic pollutants more than once in any three year period. In its responsiveness summary submitted with the final list, the State responded to EPA's concern by explaining that no water assessed in 2002 exceeded standards for acute toxic pollutants more than once in three years but in less than 10% of the available samples (see State response to EPA comments, October 2002, p. 3). Therefore, the State's specific listing decisions are consistent with both the State listing methodology and federal assessment guidance for acute toxic pollutants, and it was unnecessary for EPA to reconcile potential inconsistencies in State and federal assessment approaches with respect to acute toxic pollutant standards.

### **Basis for Decision to Add Waters to Nevada's 2002 Section 303(d) List**

Based on our initial review of the final list submission, EPA identified several waters which appeared to exceed currently applicable water quality standards, and requested that the State provide a "good cause" justification for its decision not to list them (see EPA letter, October 7, 2002). The State responded in a letter dated November 6, 2002. The concerns identified by EPA, the State's response, and EPA's decisions are discussed below.

#### **Application of pH standards that are not yet in effect**

Nevada is in the process of revising its pH standards, but the new standards are not currently in effect. For the 2002 Section 303(d) listing assessment, the State applied these new proposed standards in evaluating potential pH exceedences. Federal regulations require the evaluation of currently applicable water quality standards established under Section 303(c) in the preparation of 303(d) lists; therefore, the application of the proposed pH standards is invalid. At EPA's request, Nevada identified the waters which violate the existing pH standards and suggested that they should not be listed since revised standards, with which these waters will comply, will soon go into effect. This is not a reasonable basis for not applying currently applicable standards as required by 40 CFR 130.7(b)(3), and the identified waters will be added to the final list. Therefore, the following waters should be listed due to pH violations:

Humboldt River  
NF Humboldt River  
Steamboat Creek  
Galena Creek  
Whites Creek  
Thomas Creek  
Clear Creek  
Carson River

Colorado River (2 reaches)  
Maggie Creek

Nevada suggested that Maggie Creek should not be listed for pH because data collected at different locations on the same stream reach by the State and by a landowner were not in agreement. However, the State provided no basis for excluding these data from consideration in the listing process. When the data are grouped, 68% of available samples (n= 47) violate the currently applicable water quality standard, which clearly supports a finding that the standard is not being attained.

Because revised pH standards with which the listed waters will probably comply will likely be adopted for these waters in the near future, EPA concludes that they should receive a low priority ranking for TMDL development. It may be appropriate for the State to submit a revised Section 303(d) list that removes these new pH listings after the proposed standards go into effect, if these waters comply with the newly approved standards.

Decision not to list waters due to violations of chronic standards for toxic pollutants

\_\_\_\_\_ In general, Nevada did not list waters that appeared to exceed chronic standards for toxic pollutants. The list submission and followup correspondence do not provide a sufficient rationale for the decision not to list these waters. The State's responsiveness summary suggests that chronic standards may not have been violated in several waters because grab and composite water samples may not have been collected in stable conditions necessary to assess compliance with chronic standards. This argument is speculative and unsupported by actual analysis of available data sets. Nevada's listing methodology provides for quality assurance review and potential exclusion of spurious data. Moreover, the methodology provides for the exclusion of data collected during very high and low flow situations. It is unreasonable to assume that all data collected pursuant to valid QA/QC protocols might not be valid for purposes of comparison with chronic standards, and to therefore categorically exclude from consideration the possibility that the available data indicate the presence of chronic standards violations. Moreover, we can find no provision of Nevada water quality standards that provides an exception to the application of chronic standards on this basis. Therefore, EPA concludes that the State's decision not to list waters due to chronic standards exceedences based on its concerns about grab and composite sample results is inconsistent with federal listing requirements.

EPA's 1997 and 2002 assessment guidance documents generally recommend that waters should be listed if they exceed chronic standards for toxic pollutant effects on aquatic life more than once in any three year period. We understand the State's concern about whether the available data would be representative for purposes of assessing violations of chronic standards. However, we believe federal regulations at 40 CFR 130.7 and the structure of Nevada's water quality standards create the presumption that chronic standards will be applied in the listing

assessment process. The presumption that chronic standards are applicable in the listing assessment process is also consistent with EPA's 1997 and 2002 assessment guidance. Federal regulations at 40 CFR 130.7 establish a broad mandate to consider all existing and readily available data and information in assessing potential standards violations. The 1997 305(b) Guidance suggests that for toxicants, waters are only partially supporting their designated aquatic life uses if "acute or chronic criteria (are) exceeded more than once within a 3 year period... .." (emphasis added, EPA, 1997, p. 3-18). Waters that are only partially supporting their uses generally meet the definition of water quality limited segments for purposes of 303(d) listing (see 40 CFR 130.7(b)(5)(I)). EPA's 2002 CALM Guidance repeats this interpretation for purposes of 303(d) listing (EPA, 2002, p. 4-16). The 1997 guidance also states that this guideline "assumes at least 10 samples over a 3 year period. If fewer than 10 samples are available, the State should use discretion and consider other factors such as the number of pollutants having a single violation and the magnitude of the exceedences. (Also,) EPA believes that 4 day composites are not an absolute requirement for evaluating whether chronic criteria are being met." EPA, 1997, p 3-18. We find no basis in Nevada standards for excluding chronic standards from application based on the representativeness concern expressed in the listing submittal.

In its October 7, 2002 letter, EPA requested that the State provide a case-specific analysis of whether the available data for each specific water and pollutant for which chronic standards data were available are unreliable for purposes of assessing chronic standards. EPA also requested that the State determine whether the waters need to be listed due to exceedences of chronic standards for toxic pollutants, and carefully document its findings. In its November 6 letter to EPA, the State provided a water body-specific data analysis and comparison with chronic standards. The State concluded that Sammy Creek likely exceeds chronic standards for selenium and should be added to the Section 303(d) list. EPA concurs with this conclusion and is adding this water to the list.

In its November 6 letter, the State concluded that a few waters identified by EPA as potential listing candidates in its October 7 letter need not be listed and provided specific, analytical support for this conclusions. For most of these waters, EPA concludes that the State has provided a reasonable rationale for not listing the water bodies based on the very limited amounts of data available for each water and the very small number of observed exceedences. However, EPA disagrees with the State's assessment that Willow Creek below Buckskin Mine should not be listed. For Willow Creek, 31% of available cyanide samples (n=16) exceeded the chronic standard for cyanide. The exceedences were relatively high in magnitude (up to 26 ug/l, and approximately 15 ug/l on average, in comparison to the 5.2 ug/l applicable standard). The Creek is located in a mining area in which cyanide was used in mining processes. Cyanide generally does not occur naturally. Based on the frequency and magnitude of exceedences and the local land uses, EPA concludes that these data and information sources provide a sufficient basis for listing this water.

EPA concludes that a low priority ranking is appropriate for Sammy Creek based on the considerations that (1) there is not evidence indicating a high degree of selenium threat to beneficial uses and (2) the State has set a low priority for selenium TMDL development for the reach immediately upstream from the segment to be listed. EPA does recommend that additional monitoring and biological assessments be conducted on Sammy Creek in the near future in support of TMDL development. EPA concludes that a low priority ranking is appropriate for Willow Creek based on the considerations that (1) the limited available data do not support a finding that the threat to human health or aquatic life is substantial at this time and (2) the public expressed no concerns about this Creek.

#### Insufficient rationale for not applying RMHQs

In its October 7 letter, EPA requested that the State provide a good cause rationale for not listing waters that exceed the “Requirements to Maintain Higher Quality” (RMHQs) established in Nevada Water Quality Standards. The RMHQs are identified in Nevada standards as a tool to assist in implementation of the State’s antidegradation requirements for specific waters whose quality was higher than the applicable beneficial use standards for many pollutants. The State suggested in its November 6 letter that waters should not be listed based on exceedences of RMHQs because of potential technical errors in the RMHQs.

EPA concludes that the State has not provided a valid technical or legal rationale regarding the inapplicability of RMHQs for Section 303(d) listing decisions. Nevada’s existing standards identify the RMHQs as requirements to be applied at their respective control points, without qualification or reservation. See, N.A.C. 445A.147 et seq. Federal regulations define applicable water quality standards to be considered for Section 303(d) listing purposes to include antidegradation requirements (40 CFR 130.7(b)(3)). We understand the technical concerns about the RMHQ values but do not believe these concerns create a valid legal basis for excluding them from application. Therefore, the waters identified in table B-1 of the State submittal (and repeated in table 2 above) also need to be included on the final Section 303(d) list.

EPA concludes that a low priority ranking is appropriate for waters and pollutant listed on the basis of RMHQ exceedences. This conclusion is based on the considerations that (1) the waters currently meet the generally applicable beneficial use standards for the pollutants of concern even though their quality is lower than the RMHQs, (2) the State has raised valid technical concerns about the RMHQ values and indicated a desire to review and revise them, and (3) no commenters other than EPA expressed concern about RMHQ exceedences.

#### Rationales for not listing other waters

\_\_\_\_\_The State has also demonstrated, to EPA's satisfaction, good cause for not including on its list several waters identified in EPA’s letter to the State dated November 6, 2002. As

provided in 40 CFR 130.7(b)(6)(iv), EPA requested that the State demonstrate good cause for not including several waters. In its letter dated November 6, the State provided detailed rationales to support its conclusion, based on its weight of evidence approach, that the following waters do not exceed chronic standards for toxic pollutants:

N.F. Humboldt River—Sammy Creek to National Forest Boundary, selenium  
Las Vegas Wash, selenium  
Virgin River, selenium.

The State also provided a detailed rationale for not listing several lake segments (see pp. 5-7), and Colorado River for temperature (p. 8) based on concerns about whether available data are representative of the lake or river reaches in question. EPA concludes that the rationales provided are reasonable and that these waters/pollutants do not meet the listing requirements.

#### Nonpoint Source Impaired Waters

\_\_\_\_\_The State properly listed waters with nonpoint sources causing or expected to cause impairment, consistent with Section 303(d) and EPA guidance. Section 303(d) lists are to include all WQLSs still needing TMDLs, regardless of whether the source of the impairment is a point and/or nonpoint source. EPA's long-standing interpretation is that Section 303(d) applies to waters impacted by point and/or nonpoint sources. In *Pronsolino v. Marcus*, the District Court for the Northern District of California held that section 303(d) of the Clean Water Act (CWA) authorizes EPA to identify and establish total maximum daily loads (TMDLs) for waters impaired by nonpoint sources. *Pronsolino et al. v. Marcus et al.*, 91 F.Supp.2d 1337, 1347 (N.D.Ca. 2000), *aff'd*, *Pronsolino v. Nastri*, 291 F.3d 1123 (9<sup>th</sup> Cir. 2002). See also EPA's 1991 Guidance and National Clarifying Guidance for 1998 Section 303(d) Lists, Aug. 27, 1997.

#### Priority Ranking and Targeting

EPA also reviewed the State's priority ranking of listed waters for TMDL development, and concludes that the State properly took into account the severity of pollution and the uses to be made of such waters, as well as other relevant factors such as:

- the degree of public interest and support,
- immediate programmatic needs, and
- data availability.

The State's decision to consider additional priority ranking factors is reasonable because TMDL development is likely to be more effective, and perhaps more cost-effective, if it is done first for waters with a high level of public interest or for which other water quality program activities are concurrently addressed.

EPA also reviewed the State's identification of WQLSs targeted for TMDL development in the next two years, and concludes that the targeted waters are appropriate for TMDL development in this time frame. The State targeted more than 10% of its needed TMDLs for development over the next two years. As the State has already begun to accelerate its pace of TMDL development after having completed several TMDLs in the early 1990s, the State should be able to complete its remaining TMDLs within a reasonable period of time. The State is well underway with several of the TMDLs for targeted waters, and should be able to complete the monitoring and analysis work required for these TMDLs within the next two years. The State has targeted a mix of TMDLs for near-term TMDL development, including waters affected by point and nonpoint sources and a mix of simple and more complex TMDLs. It is noted that the TMDL for Lake Tahoe is targeted for near term TMDL work, but we recognize that it may take more than 2 years to complete this extremely complex TMDL. EPA concludes, based on these considerations, that the State's priority ranking and targeting commitments are consistent with federal requirements.

#### Administrative Record Supporting This Action

In support of this decision to approve the State's listing decisions, EPA carefully reviewed the materials submitted by the State with its 303(d) listing decision. The administrative record supporting EPA's decision is comprised of the materials submitted by the State, copies of Section 303(d), associated federal regulations, and EPA guidance concerning preparation of Section 303(d) lists, and this decision letter and supporting report. EPA determined that the materials provided by the State with its submittal provided sufficient documentation to support our analysis and findings that the State listing decisions meet the requirements of the Clean Water Act and associated federal regulations. We are aware that the State compiled and considered additional materials (e.g., raw data and water quality analysis reports) as part of its list development process that were not included in the materials submitted to EPA. EPA did not consider these additional materials as part of its review of the listing submission. It was unnecessary for EPA to consider all of the materials considered by the State in order to determine that, based on the materials submitted to EPA by the State, the State complied with the applicable federal listing requirements. Moreover, federal regulations do not require the State to submit all data and information considered as part of the listing submission.

#### References

The following list of documents was used directly or indirectly as a basis for EPA's review of the State's 303(d) water body list. This list is not meant to be an exhaustive list of all records reviewed, but to provide the primary documents the Region relied upon in making its decisions to approve the State's list.

EPA letter to Nevada approving 1998 List, with enclosure, August 13, 1998.



Nevada's 2002 List Submittal with attachments, September 30, 2002

Letter from EPA to NDEP, April 2, 2002

Letter from EPA to NDEP, September 6, 2002

Letter from EPA to NDEP, October 7, 2002

Letter from EPA to USFWS, October 9, 2002

Letter from NDEP to EPA, November 6, 2002

Nevada Water Quality Standards, N.A.C. 445A-119 et seq.

Nevada 305(b) Report

December 28, 1978 Federal Register Notice, *Total Maximum Daily Loads Under Clean Water Act*, finalizing EPA's identification of pollutants suitable for TMDL calculations, 43 Fed. Reg. 60662.

January 11, 1985 Federal Register Notice, *40 CFR Parts 35 and 130, Water Quality Planning and Management: Final Rule*, 50 Fed. Reg. 1774

April 1991, "Guidance for Water Quality-Based Decisions: The TMDL Process," EPA 440/4-91-001.

July 24, 1992 Federal Register Notice, *40 CFR Parts 122, 123, 130*, revision of regulation, 57 Fed. Reg. 33040

August 13, 1992 memorandum from Geoffrey Grubbs, Director, Assessment and Watershed Protection Division, Office of Water, EPA Headquarters, to EPA Water Quality Branch Chiefs, Regions I - X and TMDL Coordinators, Regions I - X, regarding "Supplemental Guidance on Section 303(d) Implementation."

October 30, 1992 memorandum from Geoffrey Grubbs, Director, Assessment and Watershed Protection Division, Office of Water, EPA Headquarters, to Water Quality Branch Chiefs, Regions I - X, regarding "Approval of 303(d) Lists, Promulgation Schedules/Procedures, Public Participation."

40 CFR Part 130 Water Quality Planning and Management

November 26, 1993 memorandum from Geoffrey Grubbs, Director, Assessment and Watershed Protection Division, Office of Water, EPA Headquarters, to Water Quality Branch Chiefs, Regions I - X, and TMDL Coordinators, Regions I - X, regarding "Guidance for 1994 Section 303(d) Lists."

August 27, 1997 memorandum from Robert H. Wayland III, Director, Office Wetlands, Oceans, and Watershed, Office of Water, EPA Headquarters, to Water Division Directors, Regions I - X, and Directors, Great Water Body Programs, and Water Quality Branch chiefs, Regions I - X, regarding "National Clarifying Guidance For 1998 State and Territory Section 303(d) Listing Decisions."

September, 1997 guidance from Office of Water, Headquarters, US EPA regarding Guidelines for Preparation of the Comprehensive State Water Quality Assessments (305(b) Reports) and Electronic Updates: Supplement, EPA-841-B-97-002B

November 19, 2001 memorandum from EPA Office of Water regarding 2002 Integrated Water Quality Monitoring and Assessment Report Guidance.

Consolidated Assessment and Listing Methodology, EPA Office of Water, July 2002.